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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 782 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS OF THE COURTS BELOW

The opinion of the insular District Court of San Juan ("Statement of Facts, Opinion and Judgment", R. 15-22) is not officially reported. The opinion of the Supreme Court of Puerto Rico, reversing the District Court and upholding the tax in question (R. 33-49), is reported in 54 P. R. Dec. 732 [Spanish edition, Advance Sheets, July 1, 1939]. It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals, affirming that of the insular Supreme Court (R. 55-59), is reported in 108 F. (2d) 144.

JURISDICTION

Jurisdiction exists in this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

QUESTION PRESENTED

The question is whether Puerto Rico may validly levy against a domestic corporation of the Island, organized under its insular corporation laws, its excise tax,[1]

> "on the sale of any articles the object of commerce, * * and at the time of the sale in Puerto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale",

on account of sales of oil made in Puerto Rico by the local corporation, The West India Oil Company (P.R.), to American steamship companies for use in the propulsion of their ships plying between Puerto Rico and mainland ports, and consummated by pumping the oil at San Juan into the steamships out of "bonded tanks" where the company had been holding it in storage [indiscriminately for sale and delivery either in foreign commerce or for local consumption in the Island, or for consumption, as in the present case, by American flag vessels in their voyages between the Island and the mainland]. It appears that the company had brought the oil from Aruba, Dutch West Indies, to Puerto Rico, where it had stored it in warehouses owned by the company, but which had been bonded by the Federal government at the company's request; and the particular oil sold for particular usages, as, for example, for local consumption or, as here, for the propulsion of ships to the mainland, was not segregated from the mass in the tanks, until it was pumped out at the company's request under the supervision of the Federal officials.

The Federal customs duties are remitted on oil thus sold for the propulsion of the ships between the Island and the mainland.[2]

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[1] Section 62 of the Internal Revenue Act of Puerto Rico as amended by Act. No. 17 of June 3, 1937; Appendix II, *infra*, p. 42.

[2] Sec. 309, 46 Stat. 590.

The insular District Court of San Juan thought the insular excise tax could not validly be levied on the company's act of selling the oil under these circumstances. The Supreme Court of Puerto Rico, however, took a different view. It reversed the District Court, and sustained the tax. The Circuit Court of Appeals agreed with the insular Supreme Court, and likewise sustained the tax. The company has brought this petition for certiorari, urging substantially the same contentions as in the lower courts. Respondent believes that the insular Supreme Court and the Circuit Court of Appeals were right; that the tax was validly levied against this domestic corporation in the Island as an excise tax on this business activity of selling the oil within Puerto Rico; and that the petition for certiorari should be denied.

A. *This case does not deal with foreign commerce, nor with sales of oil to ships for their propulsion in foreign commerce or to foreign countries.* It is not within the doctrine of *McGoldrick* v. *Gulf Oil Corporation*, No. 473 at the present term, decided March 25, 1940; but, on the contrary, is ruled by *McGoldrick* v. *Berwind-White Coal Mining Co.*, No. 475 at the present term, decided January 29, 1940,[3] in connection with *Newark Fire Insurance Co.* v. *State Board*

[3] Since it deals only with sales for propulsion of ships in interstate commerce between the Island and the mainland; and not at all with foreign commerce; and the sale in Puerto Rico and delivery to the American ships for consumption in domestic commerce between the Island and the mainland removed the oil from the stream of foreign commerce, and mingled it with the mass of the company's property held for sale in the Island, and the imposition of the excise tax on the company's activity in making the sale results in no practical disadvantage whatever in the carrying on of interstate commerce between the Island and the mainland; but, on the contrary, the exemption of this

of Tax Appeals of New Jersey, 307 U. S. 313, 318, 322, 323-324, and *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, *et seq.*;[4] *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, and *Loiza Sugar Co.* v. *People of Puerto Rico,* 57 F. (2d) 705, 706 [C.C.A.-1], certiorari denied, *ibid, Loiza Sugar Co.* v. *Puerto Rico,* 287 U. S. 632;[5] *People of Puerto Rico* v. *Shell Co.,* 302 U. S. 253, and *People of Puerto Rico* v. *Rubert Hermanos, Inc.,* No. 582 at the present term of this Court, decided March 25, 1940;[6] *Swan & Finch Com-*

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local company from paying the excise tax on making sales of oil it had brought in from a foreign country [Aruba] and was holding for sale in the Island would work a plain discrimination against companies bringing oil to the Island from the mainland for such sales [as for example, from Texas], and would place the dealers in Texas oil or other mainland oils at a distinct disadvantage in competing for this interstate trade; and would moreover violate the requirement of the Congress in the Organic Act for Puerto Rico [Sec. 2, *infra,* Appendix II, p. 39] "That the rule of taxation in Puerto Rico shall be uniform".

[4] The power of the Legislature extends to levying an excise tax on the business activity of a domestic corporation of Puerto Rico, regardless of whether or not the subject of those activities is properly located within the territorial limits of Puerto Rico; so that it is really immaterial here whether the oil while deposited by the petitioner in the bonded warehouse, subject to joint supervision with the Federal authorities, is to be regarded as *pro tanto* withdrawn from the territorial jurisdiction of Puerto Rico.

[5] That this tax on the domestic company's act of making the sale is an excise tax upon this business activity of this local domestic corporation.

[6] That the Legislature of Puerto Rico, as the delegate of the Congress, possesses all local legislative powers [including the taxing power], except as expressly limited by act of Congress; and that it is no objection to the exercise of such local legislative powers that the Congress may itself have legislated in the same field.

pany v. *United States*, 190 U. S. 143, 145[7]; and *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 518-522.[8]

STATEMENT

Petitioner's "Summary Statement" (*Petition*, p. 3) and also its statement of the "Questions Presented" (*Petition*, pp. 2-3) are incomplete, and somewhat inaccurate. Petitioner omits **essential facts**; viz. that:

A.—*The sales were made in Puerto Rico* [and not in New York, or elsewhere] as was correctly held by the Supreme Court of Puerto Rico, in construing, as a matter of *local law*, the requirement in this local taxing statute [Section 62 of the local Internal Revenue Act of Puerto Rico, *supra*], and affirmed by the Circuit Court of Appeals [*infra*, pp. 6-7].

B.—*The sales were made wholly for propulsion of ships in domestic commerce*, in voyages between the Territory of

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[7] That fuel oil delivered to ships for use in their propulsion between the Territory of Puerto Rico and the mainland was not an "export", nor used in foreign commerce; but that, as the Court of Appeals correctly said in the present case (R. 58-59; 108 F. (2d) 144, 147):

> "But the fuel oil was not destined for a foreign port. As stated in *Swan & Finch Company* v. *United States*, 190 U. S. 143, 'whatever primary meaning may be indicated by its derivation, the word "export" as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.' We do not regard the oil put aboard for consumption at sea as 'exports' within the meaning of Section 3 of the Organic Act of Puerto Rico."

[8] Property held in storage awaiting sale becomes a part of the common mass of property in the State [Territory].

Puerto Rico and the mainland; and not at all for any foreign voyages, or for foreign commerce in any respect.[9]

OPINION OF THE CIRCUIT COURT OF APPEALS

As above stated, the Circuit Court of Appeals upheld the opinion of the Territorial Supreme Court, which had upheld the tax. It is believed that the Circuit Court of Appeals was right, for the reasons stated in its opinion (R. 55-59, *supra*; 108 F. (2d) 144). Moreover its decision affirming the determination of the insular Supreme Court construing the phrase *"at the time of the sale in Puerto Rico"* contained *in the local insular statute* [Section 62 of the insular Internal Revenue Law; Appendix II, *infra,* p. 42], and holding *that within the meaning of that insular statute the sales involved in the present case were made in Puerto Rico* (and not in New York, or elsewhere), is in accordance with the established rule of the respect to

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[9] It is true that the "stipulation" prior to the trial (R. 14) spoke of delivery of the oil

> "to ships plying between Puerto Rico and ports of the United States and between Puerto Rico and foreign ports";

but upon the trial the only witness called was the Petitioner-company's own witness, its assistant manager, Mr. Charles H. Lee, Jr. (R. 23-31), and Mr. Lee testified that the oil in question was all delivered for use in the propulsion of ships in *voyages between the Island and the United States mainland.* His testimony is, on direct examination (R. 24):

> "Q. 9. Does the West India and its predecessor in Puerto Rico have a bonded tank for fuel oil? A. Yes, sir.
>
> "Q. 10. When was that tank bonded? A. In December, 1932.
>
> "Q. 11. What is the exact date? A. December 3.
>
> "Q. 12. What was that tank bonded for? A. To store fuel oil, which is used largely by the steamers plying between Puerto Rico and the States".

be accorded to decisions of the local Territorial Supreme Court construing local Territorial law. *Sancho Bonet, Treasurer* v. *Yabucoa Sugar Co.*, 306 U. S. 505; *Sancho Bonet, Treasurer* v. *Texas Company*, No. 132 at the present term of this court, decided January 2, 1940.

BRIEF OF AUTHORITIES APPENDED

We venture to append here, in support of our position and of the opinion of the Circuit Court of Appeals, a copy of our brief in the present case in the Circuit Court of Appeals [Appendix I, *infra*, pp. 9-38], dealing with the same questions which petitioner raises here, as it did in that court and in the insular Supreme Court.

And again on cross-examination (R. 28):

"X-Q. 50. Where was the oil delivered? A. It was delivered from the tanks in our plant to the bunkers of the steamers.

"X-Q. 51. Where are those tanks located? A. In Puerta de Tierra.

"X-Q. 52. Here in San Juan? A. Yes, sir.

"X-Q. 53. And the delivery of the 46 million gallons to which the complaint refers, was made in San Juan, Puerto Rico? A. Yes, sir.

"X-Q. 54. And the fuel oil delivered to those ships, was used by them in their trips between ports of Puerto Rico and the United States? A. Yes, sir.

"X-Q. 55. This oil was not to be used during trips to other countries? A. No, sir.

"X-Q. 56. And the oil was not brought from Aruba in transit to other countries? A. No, sir.

"X-Q. 57. Does this mean that the 46 million gallons of oil were drawn from the tanks that the company has in that manner . . . ? A. Yes.

"X-Q. 58. But the oil was not given away gratis? A. No, sir.

"X-Q. 59. Then, how was it delivered? A. The oil was sold."

CONCLUSION

The petition presents no question of importance not already settled by this Court. The decision of the Circuit Court of Appeals, affirming that of the insular Supreme Court, was right; and should not be disturbed. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX I

BRIEF OF RESPONDENT, AS APPELLEE IN CIRCUIT COURT OF APPEALS

STATEMENT

This was a petition ("Amended Petition", R. 1-6) in the insular District Court for the District of San Juan, Puerto Rico, brought by the West India Oil Company (P. R.), a corporation of Puerto Rico, the appellant here, against the Treasurer of Puerto Rico, the appellee here, for a declaratory judgment. The gist of the prayer (R. 5-6) is that Sections 62 and 16(a)[1] of the Internal Revenue Law of Puerto Rico be so interpreted as not to authorize the imposition of the insular two percent *ad valorem* sales tax "on the fuel oil exported by the plaintiff for use on the high seas, as described in paragraph four of this complaint" [R. 2-3], or, in the alternative,

> "that if Sections 62 and 16(a) tend to authorize the fixing and collection of the two percent *ad valorem* tax on the fuel oil drawn from bonded tanks under the jurisdiction of the Federal Government, for re-shipment and use on the high seas, then that such provisions are null and void in so far as they tax the fuel oil exported for use in the high seas".

The insular District Court entered judgment in favor of the plaintiff ("Statement of Facts, Opinion, and Judgment"; R. 15-22) interpreting the insular statute substantially in accordance with plaintiff's contention ("Judgment", R. 21).

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[1] Section 16(a) is not really involved. The tax is levied solely under Section 62. (Treasurer's Answer, Par. 3, R. 10; Opinion of insular Supreme Court, R. 34.)

The insular Supreme Court reversed the District Court ("Opinion", R. 33-49; Judgment, R. 49-50), and upheld the tax. The plaintiff company appeals.

OPINION OF THE SUPREME COURT

The Supreme Court's opinion, delivered by MR. JUSTICE TRAVIESO, concisely states the case as follows ("Opinion", *supra*, R. 33-35; *Italics are those of the court itself*):

> "This suit was filed under the provisions of Act No. 47 of April 25, 1931, to obtain a declaratory judgment in regard to the rights of the litigants.
>
> "The plaintiff, the West India Oil Company (P. R.), is a domestic corporation engaged in importing, purchasing and selling oil and products derived from the same. In connection with said business and to facilitate the sale and delivery of said products to purchasers, the plaintiff set up and maintained a bonded tank in the City of San Juan, Puerto Rico, in keeping with the Federal statutes (46 Stat. 743; 19 U. S. C. A., sec. 1555); said tank was used to receive and deposit fuel oil brought from foreign countries to Puerto Rico. The oil thus deposited remains in the tank for an undetermined period of time until it is (a) re-exported to a foreign country; or (b) delivered to the steamers that purchase it to be used as fuel for their engines; or (c) delivered to purchasers for use in Puerto Rico. While it remains in the bonded tank, the oil is under the control of the Customs Service of the Federal Government.
>
> "From December 1932, through August 1935, the plaintiff corporation drew about 46,000,000 gallons of fuel oil from said bonded tank and delivered them to the steamers which had purchased it for use in their trips to the Continent[2] and to foreign countries.
>
> "The Treasurer of Puerto Rico maintains that the oil thus delivered to said steamers in Puerto Rico is subject to a tax of 2 percent *ad valorem*, which in the

[2] *Id est*, the United States mainland.

present case amounts to $26,500, more or less. To impose said tax the Treasurer relies on the provisions of Section 62 of the Internal Revenue Act of Puerto Rico, as it was amended by Act No. 17 of June 3, 1927, which reads as follows:

> 'Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, *and at the time of sale in Porto Rico,* a tax of two (2) percent on the price or value of the daily sales of such articles, *whether such sales are for cash or credit,* which tax shall be paid at the end of each month *by the person making such sale.*' (Italics supplied.)

"The plaintiff corporation maintains that Section 62, *supra,* is not applicable to the oil taken out of the tank and delivered to the steamers, for the following reasons:

"1st. Because said oil never enters into Puerto Rico nor does it become property within the territory, since said tank is somewhat in the nature of a *tax-free zone,* not subject to the control of the Insular Government, but under the exclusive control of the Federal Government, said oil never being subject to the tax laws of Puerto Rico.

"2nd. Because the tax imposed would be an export[1] tax, prohibited by Section 3 of the Organic Act of Puerto Rico.

"3rd. Because said tax is a direct burden on interstate and foreign commerce and as such is not included in the powers of the Insular Legislature.

"4th. Because the fuel oil was still in foreign commerce when it was delivered to the steamers for use on the high seas.

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[1] Erroneously printed "import" in the transcript of the record here (R. 34).

"The District Court of San Juan decided that said oil had never acquired a taxable *situs* in Puerto Rico and therefore rendered judgment in favor of plaintiff. The defendant appealed. He alleges that the District Court has erred specifically in upholding each of the four reasons set forth by the plaintiff corporation against the imposition of the tax; and has committed a fifth error, in awarding costs to plaintiff.

"To complete the above findings of fact we should state that according to the testimony of Mr. Lee, assistant manager of the plaintiff corporation, the contracts for the sale of oil are signed in New York by the steamship company and the Standard Oil Company of New York; the latter notifies the plaintiff corporation that said contracts have been signed and the oil is delivered by said corporation to any ship of the purchaser steamship line that requests it. Mr. Lee also testified that when a delivery of oil is to be made, the plaintiff notifies the customs office, which inspects the valves of the tank to see that the seals have not been broken and supervises the delivery, and notes the amount delivered; that the bills and payments are made in New York; that when the oil comes from Aruba the amount to be used locally is nowhere stated, nor the amount that is to be delivered to the ships, nor the amount that is to be reexported, but that it all comes together and is thus deposited in the tanks; that the tanks are situated in the Ward Puerto de Tierra, of San Juan; that when delivery of the oil is made to the ships *the contract of sale is entered into in New York, but the oil is delivered in San Juan.*"

The contention last noticed in the above quotation, that the sales must be considered as, in legal effect, made in New York rather than in Puerto Rico, together with the four contentions listed in the four numbered paragraphs earlier in the Supreme Court's opinion (*ante*, pp. 11), are substantially the same contentions that appellant now presents here. ["Errors Relied Upon and Appellant's Position, Brief, pp. 5-6].

Further on in its opinion the insular Supreme Court found (R. 40):

> **"The complainant corporation has not considered it necessary to show us copies of the contracts entered into in New York between it and the steamship companies.** In fact, it has not even referred to said contracts in its amended petition. The fact of the existence of said contracts was first brought forth in the testimony of Mr. Lee,[4] to which we have referred. And if we accept said testimony in its entirety, the only thing that we can get out of it is that they were simply contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico,[4-(a)] which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it." (*Emphasis supplied*)

BASES OF INSULAR SUPREME COURT'S OPINION

The bases of the insular Supreme Court's opinion (R. 35-49) may be summarized as follows:

1. The lower court (the insular District Court of San Juan) was in error in considering the bonded tank belonging to this private corporation as "a tax-free zone or a Federal Zone and as such as beyond the control or jurisdiction of the Insular Government, merely because employees of the Federal Government supervise and inspect the deposit and withdrawal of the fuel oil". Such a privately owned tank, although it has been designated as a "bonded warehouse" under Section 555 of the United States Tariff Act of 1930 [Appendix II, *infra*, p. 41] is *not* United States

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[4] Mr. Lee's testimony in question and answer form; R. 23-31.

[4-(a)] May have been simply contracts for the steamship companies' "requirements" over a period of time.

Government land subject exclusively to federal jurisdiction, as is a military reservation or other reservation to which the Federal Government has acquired title *with the consent of the State legislature* so as to vest exclusive jurisdiction in the federal Government under the Constitution [Art. I, Sec. 8, Cl. 17]. No such question arises here.[5]

After examining [R. 36-38] decisions relating to federal jurisdiction over military and other federal reservations, and as to other federally owned property [*Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Commonwealth* v. *Clary*, 8 Mass. 72; *Mitchell* v. *Tibbetts*, 17 Pick. 298; *United States v. Cornell*, 2 Mason 60, Fed. Cas. No. 14,867; *State ex rel. Jones* v. *Mack*, 62 Am. St. Rep. 811; *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525; *United States* v. *Unzeuta*, 281 U. S. 138; *Standard Oil Co.* v. *California*, 291 U. S. 242; *People* v. *Suarez*, 51 P. R. Rep. .... (51 P. R. Dec. 903, Spanish edition, not yet published in English)], the insular Supreme Court concludes (R. 38-39):

> "After a thorough study of the above cited cases we feel bound to declare untenable the contention that a bonded tank belonging to and constructed on private property in Puerto Rico of a corporation, is a tax-free zone or Federal property, over which the Insular Legislature has no jurisdiction whatsoever, for the only reason that employees of the Customs Service control and inspect the movement of the fuel oil deposited in said tank to facilitate the business of the corporation."[6]

2. The court then points out (R. 39) that the question

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[5] Appellant really admits this, in its brief in this court [*Brief*, p. 11]. It makes no attempt, in this court, to defend the opinion of the District Court in this respect. All that part of appellant's contentions in the insular courts appears now to be abandoned in this court.

[6] *Confer* 22 Ops. Atty. Gen. [U. S.] 152 [1898].

r decision is *not* whether the insular Legislature has pow- to impose a tax on fuel oil while deposited in bond in the nks of the West India Oil Co.; that there is no allegation the plaintiff's complaint of the Treasurer having ever ied to impose any such tax; but that the question for ecision is simply (R. 39):

> "Is the Treasurer of Puerto Rico legally authorized to impose and collect the 2 percent tax provided for by Section 62, *supra*" [Sec. 62, Internal Revenue Law of Puerto Rico], "on the price of the fuel oil that the plaintiff corporation bound itself to sell by a contract entered into in New York, which oil was to be delivered" [and actually was delivered] "at the dock in Puerto Rico by pumping it from the tanks to the ships of the purchaser corporations?"

nd that the question depends for its solution on the inter- retation of the phrase used in that section of the statute *Appendix II, infra,* p. 42], "at the time of sale in Puerto ico". [Spanish: *"al tiempo de verificarse la venta en uerto Rico";* Laws of 1927, at pp. 473-475].

3. The court says (R. 39) further:

> "We accept as an indisputable premise that the fuel oil is an article of commerce the sale of which if it is consummated in Puerto Rico is subject to the payment of the tax. And if the other premise, that is that the sale of the oil was consummated in Puerto Rico, is established, we would be forced to the inevitable conclusion that the Treasurer was correct in applying the statute to it."

The court then (R. 39-40) states the appellant corpora- on's contention that:

> "as the contract of sale was entered into, the bills made and the oil paid for in New York, the sale must be considered *consummated* in New York and not in Puerto Rico; and that the fact that at the moment when the sale was carried out the oil was in Puerto Rico, where

delivery was made to the purchaser, does not authorize the Treasurer to impose the 2 percent tax on said sale."

And, after stating the Treasurer's contrary contention that, for the purposes of this tax, *"a sale is consummated where the delivery of the thing sold is made"*, and after commenting on the fact that *this plaintiff corporation "has not considered it necessary to show us copies of the contracts between it and the steamship companies"* and *"In fact, it has not even referred to said contracts in its amended petition"* [R. 40, quoted *ante*, p. 13], and, after pointing out that, as above quoted (*ante*, p. 13) even the fact of the existence of those contracts was first brought out in the testimony of Mr. Lee, the court proceeds (R. 40-41):

> "And if we accept said testimony" [of Mr. Lee] " in its entirety, the only thing that we can get out of it is that they were simple contracts entered into and signed in New York for the sale of a certain amount of fuel oil situated in Puerto Rico, which was to be taken from the tanks of the corporation, measured and delivered at the dock in Puerto Rico to the ships of the purchasers when these should request it.
>
> "We have no doubts that the contracts between the oil corporation and the steamship companies were perfected from the moment they were signed in New York, the contracting parties having agreed as to the thing object of the contract and as to the purchase price, without requiring the previous delivery of one or the other. Section 1339 of the Civil Code, 1930 ed. The agreement in regard to the object and the purchase price is sufficient to constitute a valid contract of sale binding as between the purchaser and the vendor, the former having an action to demand the delivery of the thing sold to him and the latter to claim the payment of the price agreed upon.
>
> "However, we are not trying to determine the rights and obligations as between the purchaser and the vendor, but the obligation that a vendor who consummates" [Spanish: *"verifica"*; 54 P. R. Dec., at p. 742; Advance Sheets, July 1, 1939] "a sale of an object of commerce

within the limit of a state enters into with a third party, the state.

"Manresa, in his Commentaries to the Spanish Civil Code, in dealing with *the perfection* and *the consummation* of a contract of sale says as follows:

> 'From the moment of agreement, and without any other requisite, the contract, we repeat, is perfected and the obligations of the parties arise; but the transmission of the property does not exist until the thing has been delivered. The delivery of the thing refers to the consummation; the section which we are studying merely states the moment in which the contract is perfected . . .
>
> We said that the generally accepted rule sustains the doctrine of the transmission of the property merely by agreement and without the necessity of the previous delivery of possession, and that, *on the contrary, our* code still requires said requisite to consider the property transmitted.' [*Italics are the court's*] 10 Manresa, page 60, 2d ed.

"And the Commentator Scaevola says:

> 'All these considerations lead us to declare as a consequence *that the transmission of the title of the thing sold from the vendor to the purchaser takes effect at the time when the contract is consummated and not simply when it is perfected.*' [*Italics are the court's*] 23 Scaevola, 318.

"The same doctrine has been upheld by this court in *Olivari* v. *Bartolomei*, 2 Judgments of the Supreme Court of Puerto Rico 79; *Capo* v. *S. A. Panzardi & Co.*, 44 P. R. R. 225; and *Benitez Flores* v. *Llompart*, 50 P. R. R. . . . ." [50 P. R. Dec. (*Spanish Ed.*) 670] "See: Section 549 of the Civil Code, 1930 ed."

After citing (R. 41-42) decisions in a number of the States along the same lines as the Puerto Rico law, the Court adds (R. 42-43):

"In the present case **the title or right of property** could not be transmitted to the purchaser **until the oil was taken from the tank, measured** and delivered to the ships.

> 'But the acceptance of the delivery order will not transfer the property if something remains to be done, such as weighing or measuring, to identify the goods or ascertain the quantity sold.' 55 C. J. 562. See pages 530-542.
>
> "See: *Iron City Grain Co.* v. *Arnold*, 215 Ala. 543, 112 So. 123. *Lopez & Moran* v. *Sobrinos de Ezquiaga*, 34 P. R. R. 75.
>
> "In accordance with the authorities cited we must arrive at the conclusion that the contract or promise of sale entered into in New York was not consummated until the oil was extracted from the tank, measured and delivered to the ships in their tanks. (*Emphasis supplied*)

Quoting from definitions in the "Dictionary of the Spanish Language" the court (R. 43) overrules the plaintiff's contention that the provision in Section 62 of the statute that the tax is to be imposed and collected "at the time of sale in Puerto Rico" ["al tiempo de *verificarse la venta* en Puerto Rico"; *cf.*, *ante*, p. 15] means "when the contract was entered into or perfected", rather than when the sale is consummated by delivery. The court holds that the language of the statute refers to the "carrying out or accomplishment of an act", and concludes its discussion of this part of the case by saying (R. 43):

> "We are, therefore, of the opinion, and we so decide, that in providing in Section 62, *supra*, that the 2 percent tax shall be imposed and collected 'at the time of sale [*"de verificarse la venta"*] in Puerto Rico' and that said tax shall be paid 'by the person *making* such sale', the legislator had the intent to and meant to impose the tax at the place of and at the moment when the sale was consummated by the delivery to the purchaser of the thing sold, without taking the manner of paying the purchase price into consideration, since the tax is made applicable to all sales whether 'for cash or on credit'. To sustain the opposite would be to make the evasion of the tax a simple matter, in New York as well as in Puerto Rico, since the courts of that state have held that the tax may not be levied when the thing

> object of the contract is delivered out of the city of New York even though the contract is entered into or signed in said city. *United Artists Corporation* v. *Taylor,* 7 N. E. (2d) 254, 273 N. Y. 334, affirming 248 App. Div. 207."

3. The court overrules [R. 44 ("2")] the plaintiff corporation's contention that the tax levied by the Treasurer on oil delivered to the ships for their own consumption,—[mostly at least to American flag ships plying between Puerto Rico and the United States mainland in the coastwise shipping trade between United States ports, San Juan and New York or Baltimore or others],—is an "export duty" prohibited by Section 3 of the Organic Act (Appendix II, *infra,* p. 39). The court, in holding that such delivery of oil to the ships, to be consumed in their own propulsion, is not an "export", within the meaning of Section 3 of the Organic Act, and in overruling plaintiff's contention that it is then "still in foreign commerce when it was delivered to the ships to be used on the high seas", points out that the ordinary meaning of the word "export" as used in the Constitution and laws of the United States is "the *transportation* of goods from this country *to a foreign country*", and quotes what the United States Supreme Court said in *Swan and Finch* v. *United States,* 190 U. S. 143, 145:

> "It cannot mean simply a carrying out of the country * * *. Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. *Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego*[7] *would never be so designated.* Another country or State as the intended destination of the goods is essential to the idea of exportation." (*Italics supplied*)

4. Replying to plaintiff's invocation of the "commerce

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[7] [Oil pumped into a steamer in San Juan to be consumed in propelling that steamer to New York].

clause" of the Constitution, and its contention that the levy of this tax on the oil delivered in Puerto Rico to the ships to be consumed in their own propulsion [between San Juan and other United States ports, mostly mainland ports] "constitutes a direct burden on interstate and foreign commerce" and therefore that the Legislature of Puerto Rico "has no authority to impose said tax", the court, without reference to the fact that the "commerce clause" is not applicable to Puerto Rico, which is not one of the States of the Union,[8] overrules plaintiff's contention (R. 44-46 ["3"], and holds that the imposition of this excise tax on this domestic corporation of Puerto Rico, upon its sales to these ships of oil for their own consumption, is *not* a direct burden on interstate or foreign commerce, within the decisions of the United States Supreme Court [*Kelley* v. *Rhoades,* 188 U. S. 1; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 518-522; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Bacon* v. *Illinois,* 227 U. S. 504; *Brown* v. *Maryland,* 12 Wheat. 419; *May* v. *New Orleans,* 178 U. S. 496; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; and *Eastern Air Transport* v. *South Carolina Tax Commission,* 285 U. S. 147, 150-153; together with the Minnesota decision in *State* v. *Maxwell Motor Sales Corp.,* [Minn.], 171 N. W. 566], and the decision of this court in the case between this corporation's predecessor and the Treasurer of Puerto Rico, *West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523.

The court (R. 45-46) quotes from the opinion in *American Steel & Wire Co.* v. *Speed, supra,* 192 U. S. 500, 518-522, where a New Jersey corporation manufacturing wire, nails, etc., in factories in various States, chose the city of Memphis, Tennessee, as its distribution point, to facilitate sales and deliveries of its products, and it appeared that upon ar-

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[8] That the commerce clause is not applicable to Puerto Rico, see: *Lugo* v. *Suazo,* 59 F. (2d) 386, 390, decided by this court on June 7, 1932.

riving at Memphis its products were deposited in the warehouse of a transportation company that delivered them to the persons to whom the New Jersey corporation sold them. Tennessee levied a tax on such products, and the corporation refused to pay it, claiming that the goods were in Tennessee only "in transit" to be delivered to its customers, and that the tax was in violation of the commerce clause. The Puerto Rico Supreme Court quotes (R. 46) the language of the United States Supreme Court upholding the validity of that tax, saying (192 U. S. at pp. 518-519; R. 46):

> "With these facts in hand we are of opinion that the court below was right in deciding that *the goods were not in transit,* but, *on the contrary, had reached their destination at Memphis,* and were *there held in store* at the risk of the Steel Company, *to be sold and delivered as contracts for that purpose were completely consummated.*" (*Italics supplied*)

5. The insular Supreme Court concludes (R. 48-49):

> "Applying the rules established in the cases we have cited to the facts in the present case, we must necessarily hold that when the importer took from the bonded tank a certain number of gallons of oil and delivered them to a ship at the dock in Puerto Rico, to consummate a sale already agreed upon, said sale was subject to the tax levied by Section 62 of the Internal Revenue Law, *supra;* that the oil thus sold, extracted and delivered by the importer lost its character as an import and came into Puerto Rico as an object of commerce and from that moment on was subject to the insular fiscal jurisdiction (*West India Oil Co.* v. *Gallardo,* 6 F. (2d) 523); that the fact that the oil has been delivered to a ship which is going to use it in its trips in interstate or international commerce does not make the oil an export, since said product was not consigned to any foreign or national port (*Swan & Finch Co.* vs. *United States, supra*); that the mere purchase of supplies or equipment which are to be used in a business in interstate commerce does not so confound said purchase with that business as to exempt it from the payment of the

tax levied by the insular law equally on all sales carried out or consummated within its jurisdiction (*Eastern Air Transport* v. *Tax. Comm.*, 285 U. S. 147); and finally that as the delivery of the oil was made at the wharf, in the San Juan harbor, the sale was consummated within the fiscal jurisdiction of Puerto Rico and was, therefore, subject to the payment of the 2 percent tax, which being a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362).

"Since no violation of a Federal statute has been invoked which would give ships engaged in interstate commerce the privilege of buying, or oil corporations, of selling, within the limits of a state, objects of commerce, without having to pay the local excise taxes on sales carried out within the limits of the state, we must hold that the West India Oil Company is legally bound to pay the sum claimed by the appellant Treasurer. To decide otherwise would be to make the act discriminatory against the other merchants engaged in the same business."

APPELLEE'S POSITION

This appellee, the Treasurer of Puerto Rico, believes that the tax is validly imposed under Section 62 of the Internal Revenue Law of Puerto Rico, and that the judgment of the insular Supreme Court upholding it should be affirmed, substantially on the same grounds stated in the opinion of that court; and also, particularly, in so far as that opinion decides that, under the laws of Puerto Rico, the sales in question were to be considered as sales made in Puerto Rico, and not as made in New York, on the further ground that that decision is an interpretation and application by the local Territorial Supreme Court of the local Territorial statutes relating to sales, primarily of certain sections of the local Civil Code of Puerto Rico directly derived from the Spanish Civil Code, and of applicable civil law doctrines and commentaries, and is therefore peculiarly within the reason of the established rule that an interpretation

of local Territorial statutes by the local Territorial Supreme Court should not be disturbed unless "clearly erroneous"; and that the ruling of the local Supreme Court in the present case is certainly not "clearly erroneous", but, to the contrary, is wholly reasonable and clearly right in itself.

STATUTES

Applicable constitutional and statutory provisions, federal and Puerto Rican, are in Appendix II, *infra,* pp. 39-42.

SUMMARY OF ARGUMENT

The argument is summarized in the Subject-Index at the beginning of this brief. As above indicated (*ante,* p. 22) it runs, in general, along the lines of the opinion of the insular Supreme Court, and in addition it relies upon the established rule of the respect to be accorded to a decision of a local Territorial Supreme Court interpreting and applying local statutes, particularly when, as here, those statutes are not derived from common law sources, but from Spanish civil law sources. [See particularly *Diaz v. Gonzalez,* 261 U. S. 102, 105-106]

ARGUMENT

POINT I

This tax on sales is an excise tax; not a tax on property.

A. It is not a property tax; not a tax levied on any property; although its amount is measured by the value of the property sold. *It is,* however, *a true excise tax* levied on the privilege of conducting the business activities of the taxpayer,—in the present case, business activities of this domestic corporation of Puerto Rico, organized there under the local corporation laws.

B. It rests upon the authority given the Legislature by the Congress, by Section 3 of the Organic Act (*infra,* p. 39)

to lay "internal revenue" taxes, coupled with the provision in Section 9 of the Organic Act (Appendix II, *infra*, p. 40) that the federal "internal revenue laws" do not run to Puerto Rico.

C. It is of the same category as the similar excise tax levied on the privilege of carrying on the business activity of manufacturing sugar in the island [Par. 14, Sec. 20, "Excise Tax Law of Porto Rico", as amended August 27, 1923, Laws of 1923, Spec. Sess., Act No. 1, pp. 2, 4], which assessed "a manufacturing charge of four (4) cents on each hundred-weight of sugar manufactured or produced",—likewise a charge or tax *on the business activity,* although measured in that instance by the amount of the sugar produced, as it is here by the amount of business done, the amount of the sales. This court, in sustaining the sugar manufacturing charge, expressly called attention to the fact that it is *an excise tax* on the business activity of producing sugar, and not at all a property tax on the sugar itself; and, consequently, held it payable by a manufacturer carrying on that activity, and measured by the entire amount of sugar he produced, *despite the fact that* some of the sugar may have been exported and thereby expressly *exempted from property taxes* on the sugar itself; and that such exportation of the sugar and consequent exemption of the sugar itself from the property tax did not at all operate to reduce or to change the measure of the excise tax laid on the business activity of producing it; and, *hence* that the *excise tax must be* paid as *measured by the full amount of the sugar manufactured,* regardless of any *property tax exemption* as to the exported sugar. This court there said (*Loiza Sugar Co.* v. *People of Porto Rico,* 57 F. (2d) 705, 706, March 22, 1932):

> "[4] The tax authorized by paragraph 14 of section 20 as amended is clearly an excise tax on the manufacture of sugar, and in terms imposed on the factory or manufacturer. As originally enacted, though it was

undoubtedly intended as an excise tax, it was literally imposed on the article manufactured, produced, or consumed. In effect, however, it was an excise tax on the manufacture of sugar. *Patton* v. *Brady*, 184 U. S. 608, 618, 22 S. Ct. 493, 46 L. Ed. 713; *Porto Rican Tax Appeals* (C. C. A.) 16 F. (2d) 545, 549; *Sanchez Morales & Co., Inc.* v. *Gallardo* (C. C. A.) 18 F. (2d) 550; *Berman* v. *Gallardo* (C. C.A.) 18 F. (2d) 581; *Goodyear Tire & Rubber Co.* v. *Gallardo*, (C. C. A.) 18 F. (2d) 926.

"Section 43 of the Act provides: 'That articles subject to taxation in accordance with the provisions of this Act shall be exempt from taxation when exported from Porto Rico, after such regulations have been complied with, entries made and such bond furnished as the Treasurer of Porto Rico may prescribe.

"Lest paragraph 14 of section 20, as originally enacted, should be construed to impose a tax on sugar as property, and by reason of the exemption on exported articles under section 43 of the act, no, or little, revenue would be derived therefrom, we think the Legislature at the special session, by the amendment to paragraph 14, undertook to make it clear that it was not the intent to impose a tax on sugar as a distinct article or item, but an excise on its manufacture."

Certiorari was denied by the United States Supreme Court. *Loiza Sugar Co.* v. *Porto Rico*, 287 U. S. 632.

In the *Loiza Sugar* case, *supra*, this court further noted (57 F. (2d) 705, at p. 706), with relation to its decision that, as above quoted,

> "it was not the intent" [of the Legislature] "to impose a tax on sugar as a distinct article or item, but an excise tax on its manufacture",

that such was likewise the doctrine of the insular Supreme Court, that (*ib.*, p. 706)

> "The Supreme Court of Puerto Rico has so construed the law in People of *Porto Rico* v. *Central Los Caños, supra*" [35 P. R. Rep. 27, 30-32].

D. Such is likewise the holding of the insular Supreme Court in the present case with regard to *the business activity* here taxed under Section 62 of the local Puerto Rican Internal Revenue Law, which levies the tax "on the sale", —a tax which the insular Supreme Court expressly calls (R. 49) in the concluding part of its opinion, as above quoted (*ante*, p. 22):

> "a sales tax is in the nature of an excise tax and not a property tax. (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362)".

E. It necessarily follows that this sales tax, being not at all a tax on the oil as property, but, instead, a tax on this corporation's privilege of conducting the *business activity* of selling,—it is really wholly immaterial to its validity, or in measuring its amount: (a) what the *situs* of the property sold was at the time of the sale; (b) whether [as this court expressly held in the *Loiza Sugar* case as above quoted; *ante*, pp. 24-25] the property sold, or some portion of it, was to be exported, or was actually exported, either afterwards, or immediately; or (c) whether the property or some part of it was in transit in interstate commerce, or in foreign commerce, at the time of the sale, or whether it had already come to rest in Puerto Rico and become mingled with the mass of the property in that Territory.[9]

None of those things have anything to do with the Legislature's power to levy this excise impost on this *business activity* of making sales, carried on by this creature of the Legislature itself,—this domestic corporation chartered under the laws of Puerto Rico, and dwelling there.

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[9] As the insular Supreme Court correctly holds that it actually had, and was no longer "in transit" in foreign commerce (R. 44-49; *ante*, pp. 19-22).

POINT II

The power of the Legislature extends to levying an excise tax on the business activities of a domestic corporation of Puerto Rico, regardless of whether or not the subject of those activities is property located within the Territorial limits of Puerto Rico.

Plaintiff's deposit of the oil in a bonded warehouse is, therefore, immaterial here, for any purpose.

The excise is levied upon the exercise of the privilege granted the company by the Insular Government, by its charter, of carrying on this business.

A. In this respect this excise tax on sales made by the company,—on its exercise of the privilege granted by its charter of carrying on this business activity, measured by a percentage of the total business done,—is analogous to a corporation tax or a franchise tax measured by the total amount of the corporation's assets or the total amount of its business transactions, which the chartering State has the power to impose on its domestic corporations, and to assess in accordance with the amount of the corporation's total assets, or total business done, including assets and business transactions located or done in other States, outside of the territorial jurisdiction of the chartering State. *Newark Fire Insurance Co.* v. *State Board of Tax Appeals of New Jersey,* 307 U. S. 313, 318, 322, 323-324; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, *et seq.*

B. Hence the only question to be considered here, with reference to the place where the sales were made, is not a question of the power of the Legislature, but is only a question of whether these particular sales fall within the limitation which the Legislature itself has voluntarily placed upon the imposition of the tax, by the limiting provision in Section 62 of the statute, providing for the imposition of the tax only

> "on the sale * * *, and at the time of *sale in Porto Rico*" (*Appendix II, infra,* p. 42),

which manifestly requires that the "sale" must have been made within the territorial limits of Puerto Rico.

C. Of course it is manifest,—and our opponents do not question,—that the definition of the word "sale" [SPANISH, *"al tiempo de verificarse la venta en Puerto Rico"; ante,* p. 15], as thus used by the local Legislature of Puerto Rico in relation to these local taxes [and particularly in applying it, as here, in relation to a local domestic corporation of Puerto Rico], is the definition of "sale" recognized by the local law.

D. It follows that the crucial question is whether or not, *under the local laws of Puerto Rico,* the sales of the oil here in question are to be considered as "sales" made "in Puerto Rico", or as sales made elsewhere. The local Territorial Supreme Court, interpreting the local laws, has held that they were made in Puerto Rico.

E. "In Porto Rico", as used in this local statute of the Legislature, manifestly means *within the territorial jurisdiction* within which, under the Organic Act [Secs. 25, 37] the Legislature has been granted, as the delegate of the Congress, "all local legislative powers". The scope of that territorial jurisdiction is defined by the Congress by the first section of the Organic Act (*Appendix II, infra,* p. 39) to extend to

> "the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands."

And by Sections 7 and 8 of the Organic Act (*Appendix II, infra,* p. 40) the jurisdiction of the insular Legislature is likewise extended over [among other things]:

"all the harbor shores, docks, slips, reclaimed land,

> • • • not heretofore reserved by the United States for public purposes[9]" (Sec. 7) • • •,

and over

> "the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes[9]" (Sec. 8) • •.

F. The designation by the customs authorities, at the request of the private owner of a warehouse, of such warehouse [primarily for the convenience of the private owner in carrying on his business] as a "bonded warehouse", under the federal tariff laws ["Tariff Act of 1930" as amended, Act of June 30, 1930, c. 497, Title IV, Sec. 555, 46 Stat. 590, 743; 19 U. S. Code, Par. 1555], plainly does not at all amount to a reservation of such warehouse "by the United States for public purposes" within the meaning of Sections 7 and 8 of the Organic Act, *supra,* in any such sense as to withdraw the warehouse from the local territorial jurisdiction granted to the insular Legislature and to the insular Government by Section 1 of the Organic Act, or to withdraw the warehouse from the operation of the insular laws. It does not place it within the category of "military reservations" conveyed to the United States, with the express consent of the State legislature in each instance [or, in Puerto Rico, upon an express "legislative grant" by the Legislature; Organic Act, Sec. 7, *supra; Appendix II, infra,* p. 40], over which the federal Government exercises "exclusive jurisdiction". Nothing of that kind is here involved. The decision of the insular Supreme Court on this point was clearly right. [Opinion, R. 35-39; *ante,* pp. 10-13].

With regard to such a "bonded warehouse", instituted

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[9] No such federal reservation is here involved in any way.

as such at the request of a private owner, the Attorney General of the United Statese ruled, years ago, under the federal statutes then in effect, substantially the same, in this respect, as the present statute [Rev. Stats. Secs. 2958, 2959, and 2960, of which the present Section 555 of the Tariff Act of 1930, *supra,* is the lineal descendant, through Section 555 of Title IV of the Act of September 21, 1922, c. 356, 42 Stat. 858, 976],—and the ruling appears to have stood unquestioned administratively ever since,—that, as it is digested in the notes to this section in the annotated edition of the United States Code [19 U. S. C. A. Par. 1555, foot-note "3", p. 1060]:

> "The private rights of the warehouseman and those having relations with him as such are in no wise affected by this joint custody, providing the rights of the government in and about the collection of its customs are not interfered with." [(1898) 22 Ops. Atty. Gen. 152].

G. It follows that, —in so far as concerns the meaning of the place limitation used by the Legislature in Section 62, *supra,* limiting the Treasurer, in his computation for the purpose of measuring the amount of the excise tax to be levied on this corporate activity, to counting only sales "in Porto Rico",—that a sale, even if made within such a bonded warehouse, could still be counted as a sale made within the territorial legislative jurisdiction of Puerto Rico, and so "in Porto Rico", within the meaning of the Legislature in this statute.

H. But the point is really immaterial here. It does not appear that any of these sales were really made within the bonded warehouse.

POINT III

The sales were made "in Porto Rico", within the meaning of Section 62 of the local excise law here involved.

A. The ruling of the insular Supreme Court to this effect [R. 39-43; *ante,* pp. 11, 12, 14-18] was clearly right.

B. Manifestly, as above pointed out (*ante*, Point II—C, p. 28], *the question* of whether the sales are to be considered as having taken place in Puerto Rico, or, as the appellant contends [*Brief*, "Point II", pp. 27-30] in New York, *is to be decided in accordance with the local law of Puerto Rico.* The Legislature in enacting this Section 62 of this local statute must be deemed to have intended to use this word "sale"[10] in the sense, and with the meaning attributed to it by the local laws.

C. The insular Supreme Court holds, that under the local law of Puerto Rico, in accordance with the applicable sections of the local Civil Code [Civil Code of Puerto Rico, Edition of 1930, Secs. 1339, 549, derived from the Spanish Civil Code], and with the comments of recognized authoritative commentators on the Spanish code [*Manresa, Scaevola*], and with earlier decisions of the Supreme Court of Puerto Rico itself, the "sales" of the oil here involved did not take place, or become completed, until their "consummation" by taking the oil from the tank, measuring it, and delivering it to the ships,—all of which was done in Puerto Rico; and that, accordingly, these sales are to be considered, under the local law of Puerto Rico, as made in Puerto Rico, and not in New York.

D. This ruling of the insular Supreme Court is likewise in accordance with decisions in various States of the Union, as the insular Supreme Court points out in its opinion (R. 41-42; and decisions there cited).

E. It is also in accordance with authorities cited by the appellant itself in its brief here (*Appellant's Brief*, pp. 19-22).

One of the recognized essentials, in order that the transaction may become a ripened "sale",—as contradistin-

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[10] Spanish edition, "al tiempo de verificarse la venta"; Laws of 1927, at pp. 473-475; *ante*, p. 15.

guished from an executory contract to sell,—is that the *goods sold shall have been so definitely identified, marked, or separated from the mass,* that they can be recognized, definitely, at once, as having become the property of the vendee;—for example, so definitely segregated and identified that they can be made the subject of a writ of replevin, or be claimed by the vendee as his property as against creditors of the vendor.

This established rule is recognized in authorities quoted in appellant's brief.

Thus, for example, in appellant's quotation (*Brief,* p. 19) from Corpus Juris (55 C. J., Sec. 534, p. 535) it is said:

> "Where there is an unconditional contract for the sale of **specific goods** * * *." (*Emphasis supplied*)

And again, in appellant's quotation (*Brief,* p. 19) from the Minnesota court's opinion in *Welck* v. *Lahart,* 122 Minn. 432, 436, the language is:

> "Presumptions. In the case of a sale of **specific goods,** that is, **goods that are specified** at the time the contract is made, the presumption is * * *". (*Emphasis supplied*)

And again in appellant's quotation (*Brief,* pp. 19-20) from *Iron City Grain Co.* v. *Arnold,* 215 Ala. 543, 544, the wording is:

> "Where the goods sold are in the possession of the seller, and **are definitely ascertained** and agreed upon—**nothing remaining to be done to determine** their **price, quantity** or **identity** * * *". (*Emphasis supplied*)

In other words, the goods must be so identified, in order to make a completed "sale", that, as said above, the vendee, in case of necessity, could sue out a writ of replevin and could put his finger on the particular goods, and say to the sheriff: "This is my property", without anything further having to be done in order to mark or identify *the particular goods* as those sold.

F. Nothing of the kind took place here. There is neither allegation nor proof that it did; no attempt whatever, in New York, to identify any particular oil as the oil sold; no sale of any particular cargo of any particular ship; no sale of any particular drums or containers marked or identified in any way. No segregation whatever was attempted in making the contracts in New York. The plaintiff West India Oil Company brought the oil in bulk from Aruba, indiscriminately, and put it all together in the same tank, and drew from the tank indiscriminately, for local consumption in Puerto Rico, for export to foreign countries, or for delivery to ships for the latter's own use under these contracts made in New York. There was no kind of identification in New York of any particular oil that any particular steamship company purchaser was to get under its contract; and no kind of identification at all, until one of its ships turned up at San Juan and asked for so much oil, which was then drawn from the mass in the tank, measured, and pumped into the ship. Until the moment that it actually flowed out of the tank, that particular oil was no more allocated to that particular steamship company purchaser than was any other part of the mass of the oil in the tank. If another ship had turned up first, belonging to another line holding one of these New York contracts, then the oil would have gone to that ship; and if that ship's demands, and local demands on the oil, had emptied the tank, then the other ship, when it came along, would have had no possible right to claim that that particular oil belonged to it, or to replevin it from the ship or the local purchaser that had actually got possession of it.

The contracts in New York appear, in effect, to have been just like what the wheat brokers call a "sale" of fifty thousand bushels of wheat in the Chicago wheat pit; not at all an actual sale of any particular wheat that the purchaser can identify as his and take away, but only a right to have that much wheat delivered to him out of the mass in a grain ele-

vator,—*provided* that much grain is there when the purchaser calls for it, and has not first been delivered to somebody else. That is not a completed sale of any particular article. It is a contract, a breach of which gives rise to an action for damages.

G. The essential element of the vendor's consent to these sales was likewise given in Puerto Rico, and not in New York.

This plaintiff company is a Puerto Rico corporation, having its principal office in San Juan. That is its domicile. "There it must dwell". *Newark Fire Ins. Co.* v. *State Board of Tax Appeals of New Jersey, supra,* 307 U. S. 313, 318; May 29, 1939. There its offices and officers are; and there its board of directors meets. It claims no office elsewhere, no "commercial domicile" in New York or anywhere else outside of Puerto Rico at which a part of its business may be said to have become "localized", such as, for example, the Wheeling Steel Corporation of Delaware had established in West Virginia. [*Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 211-215.] This appellant is a corporation of Puerto Rico, pure and simple. Its corporate acts are performed there. There, and there alone, its board meets and acts. There, and there alone, can it give its consent to a sale, or to any other contract.

I. Its purpose, for which it is chartered, and the business in which it engages, as alleged in its bill of complaint (Par. 1; R. 1-2), is "importing, purchasing and selling oil". IT IS NOT AN "AGENCY" COMPANY. It buys and sells oil on its own account. There is no suggestion in this record that it has any charter power to act as agent for others, or that it does so.[11]

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[11] There is no basis whatever in the record for appellant's suggestion (*Brief,* p. 22) that in this case, the "person making the sale" within the meaning of Section 62 of this Puerto Rican statute, "was the Standard Oil Co. of New

J. Since this appellant corporation, acting at its domicile in Puerto Rico, authorized the contracts to be made in New York on its behalf by its agent there, the Standard Oil Com-

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Jersey at its office in New York City" or that appellant

> "but acted as a mere agent of the seller to effect delivery of the thing sold."

Whatever this appellant company's relations with the Standard Oil Company may be, they are not shown in this record. But **there is no suggestion whatever, in the record, that the oil belonged in any way to the Standard Oil Company, or that this appellant West India Company was the Standard Oil Company's agent. Nothing of that kind.** The allegations (Par. 1, R. 1-2; Par. 4, R. 2-3) and the proof (Lee; R. 24), are just the other way around; that this West India Company is in business for itself, and that the contracts of sale are made for it by *the Standard Oil Company* in New York, the latter company *apparently acting as the agent of the West India Company.* Mr. Lee testified (R. 29) with relation to the former "West India Oil Company", that *such former company was an agent of the "West India Oil Company of New Jersey".* But there is no evidence anywhere,—as there is no allegation,—either that this present appellant company, or the former company, was ever an agent of the Standard Oil; nor is there anything whatever indicating this present appellant company's relations with the Standard Oil. There is just this bare statement by Mr. Lee (R. 24):

> "Q. 15. Please explain to the court the procedure used in making those sales and deliveries? A. The contract is signed in New York between the steamship company and the Standard Oil Company of New York; we receive in Puerto Rico notice of said contracts and we deliver the oil to any steamer belonging to the company which entered into such contract."

The necessary conclusion is that indicated in the opinion of the insular Supreme Court (R. 33, 35, 40; *ante*, pp. 2, 4, 5), that it was the Standard Oil Company that was acting in New York as the agent of this appellant,—the Standard negotiating there, on behalf of this appellant, with the steamship companies, for the sale of this appellant's oil in Puerto Rico.

pany, for the sale of its oil, it is evident that the original motivation of the contracts, the acts that set them in motion, the directions or the consent to them on behalf of the selling party,—the vendor's part in the "meeting of the minds",—was in each case the action of this appellant Puerto Rico corporation, at its "principal office" in San Juan, either by its board of directors or by its executive officers—[appellant has not seen fit to tell us how],—initiating the sale [or else ratifying it] by giving appropriate directions to its agent, the Standard Oil Company in New York.

The agent carried out the directions, contracts were made in New York with steamship companies, in accordance with this appellant West India Company's directions, and the ships, from time to time, came to San Juan and asked for so much oil, which was then measured out (and thus, for the first time, identified), and delivered to them.

K. *All of the essential steps of the sale* were *thus taken in San Juan*: The initial consent or direction for it; the measuring out and identifying the oil when the particular ships came to the port; and the actual delivery there in the port of San Juan. [And, also, although it is immaterial here, the proceeds must ultimately, necessarily, have come back to this appellant West India Company at its "principal office" in San Juan, even if the collections were made on its behalf by its agent, the Standard Oil Company, in New York.]

There can be no question of the correctness of the holding of the insular Supreme Court that these were "sales" in Puerto Rico; not in New York.

POINT IV

The established rule of the respect to be accorded to the decision of a local Territorial Supreme Court, interpreting local Territorial statutes and laws, is peculiarly applicable here.

A. As above pointed out (*ante*, pp. 16-17, 18-19) the insular Supreme Court's determination that these were sales in Puerto Rico, rather than in New York, is based directly upon the insular court's interpretation of sections of its local Civil Code, derived from the Spanish code, and of the text of authoritative commentators on the Spanish code,—that is to say, upon civil law sources, rather than on English common law sources.

B. Under these circumstances what was said by MR. JUSTICE HOLMES in delivering the opinion of the court in *Diaz* v. *Gonzales*, *supra*, 261 U. S. 102, 105-106, is directly applicable here:

> "The court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299. *Nadal* v. *May*, 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. * * *. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below."

C. The rule as to the respect to be paid to the decisions of the local Supreme Court interpreting local statutes and laws was recently strongly reaffirmed by the United States

Supreme Court with relation to decisions of the Supreme Court of Puerto Rico and Puerto Rican tribunals generally. The Court said, in *Sancho Bonet, Treasurer of Puerto Rico* vs. *Yabucoa Sugar Company,* 306 U. S. 505, 509-510:

> "And this Court has declared its unwillingness to overrule Puerto Rican tribunals upon matters of purely local concern or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong; and a disposition to accept the construction placed by a local court upon a local statute, and to sustain such a construction in the absence of clear or manifest error.
>
> "* * *. Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island." [*And see also the cases there cited* (*foot-notes,* pp. 509-510].

POINT V

Appellant's other contentions are sufficiently answered in the opinion of the insular Supreme Court (R. 44-49; *ante,* pp. 18-19, with comments in our footnotes).

The rulings of the insular Supreme Court on those points were plainly correct, for the reasons stated in its opinion, upon which we here rely.

CONCLUSION

The judgment of the insular Supreme Court was correct and should be affirmed.

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APPENDIX II

CONSTITUTION:

Article IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

[Sec. 1] That the provisions of this Act shall apply to the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; • • •.

Sec. 2. That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the law. • • •

That the rule of taxation in Puerto Rico shall be uniform.

Sec. 3.—(*As amended by Act of Congress, approved March 4, 1927.*)—That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; • • •

And it is further provided, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island; *Provided,* That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Post Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.

Sec. 7. That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in the treaty of peace * * *, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not heretofore reserved by the United States for public purposes, is hereby placed under the control of the Government of Porto Rico, to be administered for the benefit of the people of Porto Rico; and the Legislature of Porto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable: *Provided,* That the President may from time to time, in his discretion, convey to the people of Porto Rico such lands, * * * *. And he may from time to time accept by legislative grant from Porto Rico any lands, buildings, or other interests or property which may be needed for public purposes by the United States.

Sec. 8. That the harbor areas and navigable streams and bodies of water and submerged land underlying the same in and around the Island of Porto Rico and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes be, and the same are hereby, placed under the control of the Government of Porto Rico, to be administered in the same manner and subject to same limitations as the property enumerated in the preceding section: * * *.

Sec. 9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: * * *.

Sec. 25. That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Porto Rico".

Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * *.

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 590, 743, Secs. 555, 556, Title IV, p. 743; 19 U. S. Code, Pars. 1555 and 1556:

Sec. 555. Bonded Warehouses.

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

Sec. 556. Same—Regulations for Establishing.

The Secretary of the Treasury shall from time to

time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.

PUERTO RICO:

Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

Sec. 62. There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale. (pp. 472-474).

Sec. 16 (*a*). There shall be levied and collected, once only, on all articles included in section 62 of this Act, a tax of two (2) *per centum ad valorem,* as provided in section 4 hereof, when said articles are manufactured, produced or introduced in Porto Rico for domestic use or consumption; but payment shall be made before said articles are withdrawn from the factory or from the custody of the post office or customs authorities, or from the express or steamship agencies, in such manner as the Treasurer of Porto Rico may by regulation prescribe (p. 484).